Dowling v. *McKenney*, 124 Mass. 478. It seems that contracts which do not accord with the Statute may nevertheless have an effect in showing the intent in an escrow. See *supra*, p. 569 ff. The fact that a contract is unenforceable because not in writing does not prevent its use to show value in actions of quasi-contract, *Murphy* v. *De Haan*, 116 Iowa 61; *contra*, because "void" by statute, *Sutton* v. *Rowley*, 44 Mich. 112; or to show the amount of rent due, *Evans* v. *Winona Lumber Co.*, 30 Minn. 515; *Steele* v. *Anheuser-Busch Assn.*, 57 Minn. 18; or to show damage resulting from tort by a third party, *Burruss* v. *Hines*, 94 Va. 413; or that a settled claim had a real basis, *Michels* v. *West*, 109 Ill. App. 418; or to show reason for money paid to defendant, *Coughlin* v. *Knowles*, 7 Met. (Mass.) 57. It is unnecessary to cite authority to the effect that parties unconnected with a contract can not collaterally attack it as "void." This is true even where the defendant's liability results only from performance by plaintiff of a contract which could not have been enforced because of the Statute. *Beal* v. *Brown*, 13 Allen (Mass..) 114. In suit for specific performance of a written contract to sell land the defendant was allowed to show that the plaintiff had orally contracted to re-sell the land to him. *Frith* v. *Alliance Investment Co.*, 49 Can. Sup. Ct. 384, Ann. Cas. 1914 D. 458. It is also very generally held that the Statute must be affirmatively pleaded as a defense, since the contract gives a legal right until advantage is taken of the Statute. *Crane* v. *Powell*, 139 N. Y. 379; *Citty* v. *Manufacturing Co.*, 93 Tenn. 276. As to the interpretation of the Statute, therefore, a statement from *Evans* v. *Winona Lumber Co.*, *supra*, is applicable. "This rule may not be logical—very likely it is not, as an original proposition; but that it is the rule established by the authorities there can be no doubt." J. B. W.

Scope of the Doctrine of Rylands v. Fletcher.—A study of the doctrine of *Rylands* v. *Fletcher*, L. R. 1 Ex. 265, logically resolves itself into two considerations: first the theoretical merits of the rule, and second, its scope. For a discussion of the first aspect of such an analysis, see 29 Harv. L. Rev. 801; 2 Cooley, Torts, 1183-1187; Bigelow, Torts, 492. It is the purpose of this note to consider the scope of this "doctrine of absolute liability" as now applied by the English Courts.

In *Rylands* v. *Fletcher*, D had constructed a reservoir on his land, the water of which escaped, due to no negligence on his part, damaging P's property. It was *held* that D was liable, on the theory that "the person who brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so he is *prima facie* answerable for all the damage which is the natural consequence of its escape." In *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* [1914], 3 K. B. Div. 772, this principle was extended to apply where the defendant brings the dangerous agency upon land occupied by him under license.

However, an examination of all the important cases in point decided before 1917 indicates that the English Courts have been careful to limit, rather

than extend that doctrine. In *Nichols* v. *Marsland, L. R.* 10 Ex. 255, D had constructed and maintained with reasonable care certain artificial embankments, which were over-flowed due to an unusual storm, causing damage to P's property. The court *held* that P could not recover, asserting an exception to the rule of *Rylands* v. *Fletcher* where the damage is due to an act of God, or *vis major*,—such as an extraordinary rainfall, which it is practically, though not physically, impossible to resist. *Nugent* v. *Smith*, 1 C. P. Div. 423, 435-438, decided that a carrier might be protected from a loss occasioned by an act of God, if the loss could have been prevented by no reasonable precaution, even though it was not absolutely impossible to prevent it. Cockburn, C. J., said: "That a storm at sea is included in the term 'act of God' can admit of no doubt whatever." See also *Forward* v. *Pittard*, 1 T. R. 27, 33. *Carstairs* v. *Taylor*, 6 Ex. p. 216, *semble, held* that D was not liable for damage consequent to the gnawing of a hole by rats in D's water box, on the ground that such was a *vis major*.

A second limitation, where the damage is wrought by the act of a third person, is propounded in *Box* v. *Jubb*, 4 Ex. Div. 76. P sued for damages caused by the overflow of D's reservoir owing to the emptying therein of the water from the reservoir of a third party. *Held*, that D was not liable, the culpable act not being that of D, who was free from fault, but of a third party. This principle was affirmed in *Rickards* v. *Lothian*, 38 A. C. 263, 277, where the damage resulted from the stoppage of the drain to D's reservoir by some third party, D being guilty of no negligence.

On the theory that the reason for the rule is one of social and economic expedience, as pointed out in the opinion of Lords Cairns in *Rylands* v. *Fletcher*, many cases are held not to come within the reason, and hence not within the operation of the rule. Thus, *Smith* v. *Kenrick*, 7 C. B. 515, enunciated the doctrine that it is the right of each of the owners of adjoining mines to work his own mine in the manner which he deems most beneficial and convenient to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine; so long as such prejudice does not arise from the negligent or malicious conduct of his neighbor. See also *Wilson* v. *Waddell*, 2 A. C. 95; *Smith* v. *Fletcher*, 9 Ex. 64, *semble*. But he has no right by pumping or otherwise to be an active agent in sending water from his mine into an adjoining mine. *Baird* v. *Williamson*, 15 C. B. (N. S.) 376. In *Blake* v. *Woolf*, 2 Q. B. 426, the damage was caused by a leak in D's cistern, which was located on the floor above P. *Held*, that D was not liable, it being a reasonable user for him to bring a cistern on his premises in the way he had done, and he being guilty of no laches. According to the case of *Wing* v. *London General Omnibus Co.* [1909] 2 K. B. Div. 652, 666, in order for the doctrine of *Rylands* v. *Fletcher* to be applicable "it is for the plaintiff to prove that the defendant has committed a nuisance." On this ground the court *held* that P could not recover for injuries due to the reasonably careful operation of an omnibus by D, no evidence having been introduced to prove that the omnibus was so dangerous as to constitute a nuisance. Where a public interest demands the maintenance of a dangerous agency, such as a reservoir or water mains for

the purpose of supplying the public with water, it is *held* that the defendant is only liable when negligent. See the opinion of Bramwell, B., in *Nichols* v. *Marsland, supra; Green* v. *Chelsea Waterworks Co.,* 70 L. T. R. 547 (where the laying of the mains was authorized by an Act of Parliament); *Madras Railway Co.* v. *Zemindar,* 30 L. T. (N. S.) 770 (where the Indian tanks in question had existed from time immemorial).

As the above cases indicate, the doctrine of *Rylands* v. *Fletcher* has been limited and confined to such an extent that, in the words of Dean Thayer, 29 HARV. L. REV. 801, "if the two rules of law, namely the doctrine of *Rylands* v. *Fletcher* and the rule prevailing where the case is rejected and the defendant's liability depends on negligence, be compared in their practical result, the difference between the two in the actual protection given by the law to the injured person is not very great." In speaking of the same matter, Sir Frederick Pollock, in his book on the law of fraud in British India, comments: "In every case of the kind which has been reported since *Rylands* v. *Fletcher,* that is, during the last twenty-five years, there has been a manifest inclination to discover something in the facts which took the case out of the rule." But this apparent tendency to restrict and limit the doctrine promulgated in that celebrated case seems not only to have been checked and retracted, but to have been cast in the opposite direction. The restriction now seems to have been attenuated to such an extent as to hold the defendant liable where the damage is caused by an act of God. See the decision of House of Lords in *Corporation of Greenock* v. *Caledonian Railway Co.,* 117 L. T. 483, decided in Dec., 1917.

D, a municipal corporation, had constructed a pond on land acquired by them for purposes of a public park, by the diversion of a stream through enclosed culverts. Owing to a storm of unprecedented violence, the pond overflowed, and a great volume of water, which would have been carried off by the stream in its natural course, poured down and damaged P's property. In an action by P to recover therefor, D pleaded that the extraordinary rainfall was a *damnum fatale,* or act of God, which they could not have foreseen, and for the consequences of which they were not liable. D admittedly was guilty of no negligence. *Held,* that P could recover; it being considered that there was a duty on anyone who interferes with the course of a stream to provide a substitute adequate to carry off the water brought down by even extraordinary rainfalls, and he is liable for damage resulting from the deficiency of the substitute which he has provided for the natural channel. According to the reasoning of the court, such damage is not in the nature of *damnum fatale,* but is the direct result of obstructing a natural watercourse.

The decision in the principal case was based upon the adjudication in *Kerr* v. *Earl of Orkney,* 20 Sess. Cases 298. It was there held that P could recover for damages sustained through the bursting of a dam, consequent upon a very excessive rainfall. But this holding is no authority to sustain the position taken in the instant case, because there was an express finding that D was negligent in the construction of the dam. See the findings by Sheriff in note on p. 300. The Lord Ordinary in his opinion said

that "there is evidence in process that the same was in some respects insufficient and inadequate." And Lord Justice CLERK observed: "In this case the reclaimer cannot even plead great and unusual precautions. He had not the advice of a skilled engineer. * * * He had no proper plans formed by those competent to judge * * * etc." Furthermore, although the flood was great, it was not unprecedented. Such a rainfall might have been foreseen by ordinary prudence, for, as Lord Justice CLERK (p. 302) said, "an extraordinary fall of rain is a matter which in our climate cannot be called a *damnum fatale.*" The words "in our climate" are significant.

It seems as if the principal case presented such facts that it clearly came within the rule of *Nichols* v. *Marsland,* so that D should have been relieved of liability on the ground that the damage was caused by an act of God. The argument of Lord Wrenbury seems specious, that "assuming an act of God, such as a flood, wholly unprecedented, the damage in such a case results not from the act of God, but from the act of man in that he failed to provide a channel sufficient to meet the contingency of the act of God." Such an argument has no bounds, for it is not inconceivable that every construction, no matter how strong and durable, could be destroyed by some act of nature. According to this view, the fact that the damage was due to an act of God would seem to afford no excuse or defense. It would seem, too, that the interest of the public in the construction and maintenance of the bathing beach would warrant the holding that this was a reasonable use of the property, so that D would be liable only when he failed to exercise due care. See *Green* v. *Chelsea Waterworks Co., semble,* supra.

For the condition of the American authorities in regard to the rule of *Rylands* v. *Fletcher* see the exhaustive article by Professor H. Bohlen, 59 U. OF PA. L. REV. 298, 373, 423. C. L. K.